

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company
for approval of Settlement Agreement Amending
Power Purchase and Sale Agreement with
Westside Cogens and for Authority to Recover
the Cost of the Amended Agreement in Rates.

Application 14-12-005
(Filed December 5, 2014)

**DECISION APPROVING PACIFIC GAS AND ELECTRIC COMPANY'S
APPLICATION FOR APPROVAL OF SETTLEMENT AGREEMENTS
AMENDING POWER PURCHASE AND SALE AGREEMENTS WITH
WESTSIDE COGENS AND GRANTING AUTHORITY TO RECOVER THE
COST OF THE AMENDED AGREEMENT IN RATES**

Summary

Pursuant to Rule 12.1 of the Commission's Rules of Practice and Procedure, we grant approval of four Settlement Agreements amending the Power Purchase and Sale Agreements between Pacific Gas and Electric Company (PG&E) and four qualifying facilities: Coalinga Cogeneration Company, Mid-set Cogeneration Company, Salinas River Cogeneration Company, and Sargent Canyon Cogeneration Company. We also grant PG&E's request to recover costs incurred pursuant to the amended Power Purchase Agreements through its Energy Resource Recovery Account.

In addition, we grant PG&E's Motion for leave to file Attachment A and C to its Application as confidential material under seal.

1. Background

Pacific Gas and Electric Company (PG&E) and the Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Salinas River Cogeneration Company, and Sargent Canyon Cogeneration Company (collectively Westside Cogens) have existing Power Purchase Agreements (PPAs) which provides for energy and firm capacity deliveries through December 31, 2016. Each of the PPAs are essentially identical except for the facility identifying information.

The parties began negotiating the current PPAs in November 2009; the four PPAs were then approved by the Commission in D.11-03-010.¹ Section 8.04 of the PPAs address the allocation between electricity generation and other cogen plant operations of Greenhouse Gas (GHG) compliance costs. Subsection (b) of Section 8.04 reference a formula in Section 95112 of the California Code of Regulations (CCR) to determine PG&E's obligation to reimburse the Westside Cogens for their electricity-related GHG emission compliance costs. Subsection (c) of Section 8.04 included an alternative formula for allocating GHG compliance costs if there was "no available formula in any other applicable rule or regulation."²

Effective January 1, 2012, CARB amended Section 95112 of the CCR and the relevant formula was deleted. Through 2013 and 2014, PG&E and the Westside Cogens were in dispute on the appropriate formula to be used to calculate GHG compliance costs reimbursable to the Westside Cogens. Since the formula was deleted from Section 95112, PG&E reimbursed the Westside Cogens based on the formula in Section 8.04(c). The Westside Cogens asserted that

¹ See PG&E's Application 14-12-005 at 5.

² *Ibid* at 5-7.

subsection (b) should still apply and that a formula in CARB regulation Section 95891(c) could replace the Section 95112 formula as an “available formula in an applicable rule or regulation.”³

The parties engaged in management level and executive level negotiations but were unable to resolve the dispute. The Westside Cogens invoked Section 10.03 of the PPAs and requested mediation. The parties entered into formal mediation and reached settlement on October 16, 2014.⁴

On December 5, 2014, PG&E filed the instant application seeking approval of the four Settlement Agreements and requesting authority to recover costs associated with the amended PPAs.⁵ On January 9, 2015, the Office of Ratepayer Advocates (ORA) filed a protest to the application. In its protest, ORA alleges that PG&E provided insufficient information for ORA to evaluate the reasonableness of the proposed settlements. On January 20, 2015, PG&E filed its timely reply to the protest and the Westside Cogens filed a motion for party status in the proceeding. During the pendency of the application, PG&E responded to data requests issued by ORA and provided additional information on the proposed settlements. On February 23, 2015, a prehearing conference was held in which ORA withdrew its protest.

³ *Ibid* at 7-8.

⁴ *Ibid* at 8-9.

2. The Settlement Agreements

On October 16, 2014, the parties conducted all-day mediations, resulting in settlement agreement for each of the four relevant PPAs. The Westside Cogens agreed to withdraw their notice of dispute and release claims against PG&E for reimbursement of costs for 2013 through June 30, 2014. The Proposed Settlement Agreement amends the subsection (b) of Section 8.04 of the PPAs to use a fixed number to allocate GHG costs for which PG&E will reimburse the Westside Cogens rather than the formula that no longer exists in Section 95112 of the CCR. PG&E has agreed to reimburse the Westside Cogens for their GHG compliance costs based on the proposed amendments as of July 1, 2014. The proposed Settlement Agreements are conditioned upon Commission Approval. If the Commission does not approve the proposed Settlement Agreements, the Westside Cogens have agreed to return to PG&E the difference between the amount paid under the proposed Settlement Agreements and the amounts that would have been paid under § 8.04(c). The Westside Cogens can then reinitiate the dispute resolution process and pursue their claims through arbitration.⁶

3. Discussion

We have historically favored settlements as a means of resolving contested issues where the settlement is reasonable in light of the record, consistent with law, and in the public interest. Settlements reduce the time and expense of litigation, conserve Commission resources and allow parties reduced risks associated with litigation.⁷

⁶ *Ibid* at 9-11.

⁷ *See* D.05-11-005 at 16.

3.1. The Settlement Agreements are Reasonable in Light of the Whole Record

CARB amended Section 95112 of the CCR after the PPAs were executed and deleted the formula used by the parties to allocate between electricity production and thermal plant operations' GHG-related costs. PG&E and Westside Cogens had different but reasonable interpretations of the appropriate formula to be used from that point forward. PG&E asserted that the formula in subsection (c) should be used while the Westside Cogens asserted that Section 95891(c) of the CARB's regulations provided an "available formula in an applicable rule or regulation."

The parties conducted dispute resolution pursuant to the PPAs, engaging first in management and executive level negotiations and then participating in the mediation process.

By using a fixed number, potential future disputes are eliminated if CARB again amends its regulations. The Settlement Agreements also resolve disputes on past payments from 2013 through June 30, 2014, which represent a more favorable outcome for PG&E ratepayers when compared to reimbursement costs under the Westside Cogens' interpretation.⁸ We find the proposed Settlement Agreements to be a reasonable resolution of the dispute between PG&E and the Westside Cogens.

3.2. The Settlement Agreements are Consistent with the Law

In past decisions, we have encouraged utilities and third party generators to address GHG compliance cost allocation issues and risks through contractual

⁸ *Ibid* at 12.

means.⁹ We have also found it reasonable to amend existing contracts when GHG compliance costs are unclear or ambiguous.¹⁰

In this case, the current PPAs were approved by the Commission in D.11-03-010 and contain provisions that address GHG compliance costs. The CARB regulation containing the relevant formula to be used was amended through no fault of the parties, and there is now a dispute on the appropriate formula and methodology to be used. The proposed Settlement Agreements clarify the parties' GHG compliance obligations for the remainder of the PPAs' terms and are consistent with Commission precedent.

3.3. The Settlement Agreements are in the Public Interest

The Settlement Agreements, if approved, reduce time, costs, and uncertainty associated with continued litigation. If PG&E and Westside Cogens had not reached settlement through mediation, the parties would have proceeded to arbitration under the PPAs' dispute resolution provisions.¹¹ Arbitration would increase expenses and time for all parties and the outcome would be uncertain.

4. Conclusion

The Settlement Agreements reduce uncertainty and costs associated with continued litigation. The fixed number in the Settlements eliminates further litigation if CARB further amends its regulations during the remainder of the

⁹ See D.12-04-046 at 61.

¹⁰ See D.13-08-009 and D.13-12-006 in which we approved amendments to PPAs between PG&E and third party generators in order to clarify GHG compliance cost obligations.

¹¹ See Application at 14.

PPA terms. In conclusion, we find the Settlement Agreements to be reasonable in light of the whole record, consistent with the law, and in the public interest. As such, we grant approval of the Settlement Agreements and grant authority for PG&E to recover costs under the amended PPAs through its Energy Resource Recovery Account.

5. Request to File Under Seal

With the application, PG&E filed a Motion for Leave to File Confidential Materials under Seal pursuant to Public Utilities Code § 583 and General Order 66-C. The confidential materials include Appendix A (Settlement Agreements) and C (Confidential Analysis of Settlement Agreement) to the Application. PG&E asserts that Appendix A is the Settlement Agreements which amend terms of the existing PPAs and are commercial documents protected from disclosure. Appendix C consists of a description of the Settlement Agreement terms and an analysis of costs and benefits of the Settlement Agreements. PG&E contends that Appendix A and C contain non-public information pertaining to its operations and that public disclosure could subject them to potential unfair competitive disadvantage in connection with the business negotiations and dealings with vendors, potential business partners and others. We have granted similar requests in the past and we agree that details of Appendix A and C, if disclosed, could place PG&E at an unfair competitive disadvantage. Therefore, the motion is granted.

6. Categorization and Need for Hearing

In Resolution ALJ 176-3348, dated December 18, 2014, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were necessary. Since ORA has withdrawn its protest, this proceeding is uncontested and the decision grants the relief requested by the

party, no hearings are necessary. We confirm the categorization as ratesetting, and change the hearing determination to no hearings are necessary.

7. Waiver of Comment Period

Since ORA has withdrawn its protest, this is now an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

8. Assignment of Proceeding

Michael Picker is the assigned Commissioner and S. Pat Tsen is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Notice of the Application appeared on the Daily Calendar on December 10, 2014.
2. The Office of Ratepayer Advocates filed its protest on January 9, 2015 and later withdrew the protest at the prehearing conference on February 20, 2015.
3. PG&E seeks Commission approval of its Settlement Agreements with Coalinga Cogeneration Company, Mid-set Cogeneration Company, Salinas River Cogeneration Company, and Sargent Canyon Cogeneration Company amending existing Power Purchase and Sale Agreements to clarify its obligation to reimburse the cogenerators for their greenhouse gas compliance costs.
4. PG&E also seeks Commission authority to recover costs associated with the amended Power Purchase and Sale Agreements in its Energy Resource Recovery Account.
5. The Settlement Agreements are reasonable in light of the whole record, consistent with the law, and in the public interest. The Settlement Agreements

convey sufficient information to permit the Commission to discharge its future regulatory obligations with respect to the parties and their interests.

6. Approving the Settlement Agreements is the relief requested by the parties and this relief is not opposed by any party in this proceeding.

7. Pursuant to Public Utilities Code § 583 and General Order 66-C, PG&E filed a motion for leave to file confidential materials under seal, including Appendix A and C to the application.

Conclusions of Law

1. PG&E's application for approval of its Settlement Agreements with Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Salinas River Cogeneration Company, and Sargent Canyon Cogeneration Company amending existing Power Purchase and Sale Agreements should be granted.

2. PG&E's request to recover costs incurred pursuant to the amended Power Purchase and Sale Agreements through its Energy Resource Recovery Account should be granted.

3. PG&E's motion for leave to file confidential material under seal should be granted.

4. This proceeding is designated a ratesetting proceeding with no hearings necessary.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company's application for approval of its Settlement Agreements with Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Salinas River Cogeneration Company, and Sargent

Canyon Cogeneration Company amending existing Power Purchase and Sale Agreements is granted.

2. Pacific Gas and Electric Company's request to recover costs incurred pursuant to the amended Power Purchase and Sale Agreements through its Energy Resource Recovery Account is granted.

3. The Motion for Leave to Submit Confidential Material under Seal filed by Pacific Gas and Electric Company (PG&E) is granted. Appendix A and C to the Application will remain under seal for a period of two years after the date of this order. During this two-year period, this information will remain under seal and shall not be made accessible or disclosed to anyone other than the Commission staff, or on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), the Law and Motion ALJ, the Chief ALJ, or the Assistant Chief ALJ, or as ordered by a court of competent jurisdiction. If PG&E believes that it is necessary for this information to remain under seal for longer than two years, it may file a new motion stating the justification for further withholding of the information from public inspection. This motion shall be filed at least 30 days before the expiration of today's limited protective order.

4. Application 14-12-005 is closed.

This order is effective today.

Dated _____, at San Francisco, California.